

**1. Requested Motion:**

**Meeting Date: Jun 21, 2010**

This motion is first, to approve a Coastal Structure Permit for the Lee County Beach Restoration Project and to instruct the Town Manager to issue that permit, and secondly to make the following findings of fact:  
the Lee County activities set forth in the permit are adjunct to a lawfully existing activity and are for a purpose necessary to protect or promote the public welfare.

**Why the action is necessary:**

Required for the issuance of a permit pursuant to Section 14-3 (b) of the Town's land Development Code.

**What the action accomplishes:**

Enables the Town to protect its interest in the proper construction and future maintenance of the Lee County Beach Restoration Project's groin structure and associated activities.

**2. Agenda:**

☐ Consent  
☒ Administrative

**3. Requirement/Purpose:**

☐ Resolution  
☐ Ordinance  
☐ Other

**4. Submitter of Information:**

☐ Council  
☒ Town Staff  
☒ Special Counsel

**5. Background:**

1. The Town and Lee County have engaged in efforts to establish a beach restoration project for several years.
2. The corresponding Beach Re-nourishment ILA between the Town and Lee County calls for construction of a groin structure as a part of the project.
3. The Town's LDC section 14-3(b) provides for the issuance of a permit for such activity and associated activities.
4. A copy of the permit is included herewith.
5. A copy of a memorandum from attorney Anne Dalton is also included for your information and consideration.


**6. Alternative Action:**

None recommended.

**7. Management Recommendations:**

Approve the suggested motion and enable the project to move forward.

**8. Recommended Approval:**

Town Manager	Town Attorney	Finance Director	Public Works Director	Community Development Director	Cultural Resources Director	Town Clerk
						

**9. Council Action:**

☐ Approved    ☐ Denied    ☐ Deferred    ☐ Other

Anne Dalton, Esquire  
2044 Bayside Parkway  
Fort Myers, Florida 33901  
(239) 337-7900

# Memorandum

**To:** Mayor, Vice Mayor, Councilmembers  
**CC:** Town Attorney, Town Manager, Finance Director, Town Clerk  
**Date:** June 16, 2010  
**Subject:** Town Permit Associated with County Beach Restoration Project

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Pursuant to Town Council direction on June 7, below is a legal analysis of issues related to the referenced proposed Town permit.

## **I. AUTHORITY FOR ISSUANCE OF PERMIT**

**SUMMARY:** The first step in creating the permit is to determine which provision of the Town Land Development Code (LDC) applies: Section 14-3(a)(13) or Section 26-82(b). For reasons set forth below, it is recommended that the Town utilize Section 14-3(a)(13) for this permitting process and that the Town Council direct the Town Manager to issue the permit pursuant to LDC Section 14-3 (b), inclusive of the findings of fact required by that section.

### **LDC SECTION 14-3(a)(13): Installation of Shoreline Stabilization Materials with Town and DEP Permit**

This LDC section requires both the Town and the DEP to issue a permit where a person (which includes the County) wishes to “deposit/install rocks, concrete, or other shoreline stabilization materials” on a beach, dune, or in the water adjacent to a beach.<sup>1</sup> There are two (2) reasons why this section should be utilized in crafting the permit:

1. Absent an exception, this is mandatory language, i.e., the Town must issue this permit.
2. The Town has two different roles in the County beach restoration process: its inherent home rule power to enter into a contract (illustrated by the negotiation and prospective approval of the interlocal agreement with the County) and its independent regulatory powers (illustrated by the issuance of the permit contemplated herein). Were the interlocal agreement cancelled for any reason, the County has indicated that it may well wish to proceed with Beach Restoration. That would leave the permit

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<sup>1</sup> LDC Section 14-3(a)(14) addresses the issuance of a DEP (not Town) permit, when a person (including the County) wishes to deposit or add sand to the beach and dune system. That is not under discussion in this memo, as the Town lacks jurisdiction to issue a permit under this section.

as the Town's principal mechanism to regulate the County's activity within Town jurisdiction.

LDC SECTION 26-82 (b): Channel Dredging and Beach Renourishment

This section addresses "Town-sponsored projects for maintenance dredging of canals or beach renourishment" and "privately sponsored dredging projects." The project is exempt from issuance of a permit under that scenario. If it is neither a "Town-sponsored project" nor a "privately sponsored project", this section of the LDC would not apply. There are three reasons why it is not advisable for the Town to declare that this is a "Town-sponsored project."

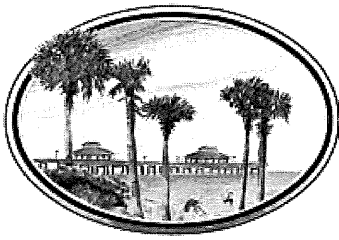
1. In order for the project to be Town-sponsored under Section 26-82(b), the project must have been approved in accordance with Chapter 2, Article VI of the LDC (which addresses Town capital improvements projects). The Revised Five-Year Schedule of Capital Improvements, FY 08/09 to 12/13 set forth in the Capital Improvements Element of the Comprehensive Plan (Table 11-7) shows no proposed funding for beach restoration for FY 09-13. Of course, this table is reviewed annually by the LPA and the Town Council in the course of the Town budget processes, with necessary modifications made via Ordinance later in the year. At this time, the Town has not declared this to be a capital improvement project and the mechanics of doing so might be difficult, given the short timeframe of this ILA approval process and length of time this project has been pending.
2. More importantly, the Council has expressed significant concerns regarding protection against Town liability in the event that elements of the beach restoration do not succeed. The County previously obtained the project permits and authorizations from the DEP and Army Corps of Engineers. The Town is not listed as a party to these permits. It would increase the Town's liability exposure (and potentially reduce the County's liability exposure) for the Town to state it is a sponsor this project.
3. As set forth above, it is legally advisable for the Town to retain regulatory control over the parts of the project within its jurisdiction.

Accordingly, it is recommended that the Town **not** proceed under LDC Section 26-82(b) to declare this a Town-sponsored project and therefore exempt from the Town permitting processes.

LDC SECTION 14-3 (b): Issuance of Permit by Town Manager

It would be advisable for the Town Council to direct the Town Manager to issue the permit pursuant to LDC Section 14-3(b). **Proposed findings of fact compliant with the requirements of LDC Section 14-3(b) have been drafted by Town Staff and Town Special Counsel for the proposed Council motion set forth in the Agenda Item Summary (blue sheet).**

Attached for your review and consideration is the draft permit to be formally presented on Monday evening. Thank you and please advise as to questions.



# *Town of Fort Myers Beach*

*Larry Kiker*  
Mayor

*Bob Raymond*  
Vice Mayor

*Tom Babcock*  
Council Member

*Jo List*  
Council Member

*Alan Mandel*  
Council Member

June 21, 2010

Lee County Board of County Commissioners  
C/O Steve Boutelle, Operations Manager  
Lee County Division of Natural Resources  
1500 Monroe Street, 3<sup>rd</sup> Floor  
Fort Myers, FL 33901

RE: Coastal Structure Permit for Lee County Beach Restoration Project

Mr. Boutelle,

This permit, issued under the authority of the Town of Fort Myers Beach, as set forth in its Ordinances, Land Development Code, including but not limited to Town of Fort Myers Beach Land Development Code Section 14-3 (b), and applicable Florida Statutes, is authorization for Lee County to construct a groin of approximately two hundred (200) feet at Bowditch Point and conduct activities associated with, and part of, the Estero Island Beach Restoration Project. The groin proposed by Lee County at Bowditch Point complies with Town of Fort Myers Beach Comprehensive Plan Policy 5-D-1 vii, which specifically allows terminal groins at inlets.

This authorization is subject to the following conditions:

1. The groin must be constructed by Lee County according to the approved Florida Department of Environmental Protection Joint Coastal Permit number 0173059-001-JC and U.S. Army Corps of Engineers permit number SAJ-2000-301 (IP-MN).
2. Lee County must submit to the Town any request for permit modification, including minor modification of the groin or beach restoration project in advance of the County's submission thereof to any other governmental agency.
3. The Town must approve any proposed modifications to the monitoring plan approved in JCP 0173059-001-JC. Lee County must notify the Town in writing prior to making any request for modification to the monitoring plan to any other governmental agency.

4. Lee County shall provide copies of all monitoring reports, including but not limited to bathymetric surveys, sand compaction reports, and aerial photography, to the Town within 30 days of submission of the reports to the DEP.
5. Lee County shall notify the Town 30 days prior to any maintenance or construction modification work associated with the groin.
6. Lee County shall provide copies of all sea turtle monitoring reports within 7 days of submission to the Florida Fish & Wildlife Conservation Commission.
7. This permit shall expire if construction is not completed by March 5, 2012.

Town of Fort Myers Beach, Florida

BY: \_\_\_\_\_  
Terry Stewart, Town Manager

FILED AND ACKNOWLEDGED:

Filed on this date with the Town Clerk of the Town of Fort Myers Beach, Florida, receipt of which is hereby acknowledged.

\_\_\_\_\_  
Michelle Mayher, Town Clerk

\_\_\_\_\_  
Date

CC: Town Council  
Anne Dalton, Esquire, Special Counsel, Town of Fort Myers Beach  
James T. Humphrey, Esquire, Town Attorney, Town of Fort Myers Beach  
Keith Laakkonen, Town of Fort Myers Beach